
To: Wells' Dairy, Inc. (patatty@ipmvs.com)
Subject: TRADEMARK APPLICATION NO. 78456872 - FRUIT BURSTS - T54484US00
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Attachment - 2
Attachment - 3
Attachment - 4
Attachment - 5
Attachment - 6
Attachment - 7
Attachment - 8
Attachment - 9
Attachment - 10
Attachment - 11
Attachment - 12
Attachment - 13
Attachment - 14
Attachment - 15
Attachment - 16
Attachment - 17
Attachment - 18
Attachment - 19
Attachment - 20
Attachment - 21
Attachment - 22

[Important Email Information]
UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/456872

APPLICANT: Wells' Dairy, Inc.

CORRESPONDENT ADDRESS:
BRUCE W. MCKEE
MCKEE, VOORHEES & SEASE, PLC
GRAND
801 GRAND AVE STE 3200
DES MOINES IA 50309-8009

RETURN ADDRESS:
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: FRUIT BURSTS

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CORRESPONDENT'S REFERENCE/DOCKET NO: T54484US00

Please provide in all correspondence:

CORRESPONDENT EMAIL ADDRESS:
patatty@ipmvs.com

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address..

Serial Number 78/456872

Applicant is requesting reconsideration of a final refusal dated September 15, 2006.

Applicant states the examining attorney did not attached evidence showing "...known consumer confusion of source with candy and ice cream bearing similar marks." Such evidence was attached to the Final Action of 03/15/2006. See Lexis® excerpt from *Forbes Magazine*, May 26, 2003 attached to Final Action.

Applicant argues that the wording "BURSTS" is weak. Though the wording "FRUIT" has been disclaimed, the word is still part of the mark, and contributes to the commercial impression of the mark as a whole. The marks must be considered in their entirety when determining whether there is likelihood of confusion. A disclaimer does not remove the disclaimed portion from the mark for the purposes of this analysis. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214 (TTAB 2001); *In re MCI Communications Corp.*, 21 USPQ2d 1534 (Comm'r Pats. 1991). Purchasers are not aware of disclaimers that reside only in the records of the U.S. Patent and Trademark Office.

After careful consideration of the law and facts of the case, the examining attorney must deny the request for reconsideration and adhere to the final action as written since no new facts or reasons have been presented that are significant and compelling with regard to the point at issue.

See additional evidence attached showing that providers of candy also provide frozen confections under the same mark.

Accordingly, applicant's request for reconsideration is *denied*. The time for appeal runs from the date the final action was mailed. 37 C.F.R. Section 2.64(b); TMEP Section 715.03(c).

Gretta Yao
/Gretta Yao/

Attorney
United States Patent and Trademark Office
Law Office 105
T. 571.272.9313
F. 571.273.9313

Note:

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Email 1 includes the following 6 attachments

1. m&M-1
2. m&M-2
3. m&M-3
4. dove-1
5. dove-2
6. dove-3

Email 2 includes the following 9 attachments

1. 3Musketeer-1
2. 3Musketeer-2
3. 3Musketeer-3
4. snickers
5. milkyway
6. starburst
7. twix
8. twixcandy-1
9. twixcandy-2

Email 3 includes the following 7 attachments

1. starbust2-1
2. starbust2-2
3. snickers2
4. milkyway2
5. 3musket2
6. m&M2
7. dove2

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THOENE VENDING

Cold Drinks Gatorade & Bottled Water Healthy Snacks Candy & Snacks Office Coffee Service M&M Ice Cream Products Service & Repair

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M&M ICE CREAM PRODUCTS

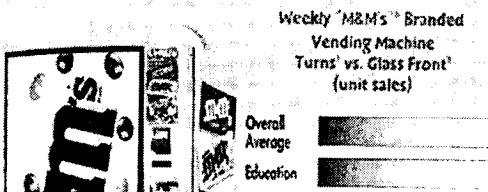
Click to download Adobe Acrobat .pdf files with Nutritional Information:

[Side 1](#)

[Side 2](#)

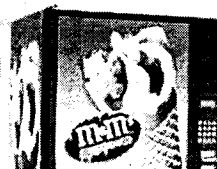
Thoene Vending has an EXCLUSIVE on providing M&M Branded Vending Machines in Central Texas. See below for the list of M&M products we handle.

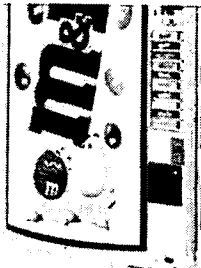
BRANDED VENDING MACHINE



ICE CREAM VENDING MACHINE

- SNICKERS' THE BIG ONE' Ice Cream Bar is the #1 item in impulse outlets, outselling its closest rival by over 30%.
- The "M&M's" Brand Cookie Ice






Transit
Zoo
Retail
Amusement
Parks
Glass Front
NEW 8.27 code only

MACHINE SPECIFICATIONS

Capacity: 219 (368 Bars, 351 Bags)
Number of Selections: 10
Height: 72"
Width: 39"
Depth: 31"
Weight: 640 lbs.
Internal Temperature: Pre-set 61°F
Payment Systems: M&M Coin Mechanism
Bill Acceptor
Power Requirements: 110 Volts, 60 Hz, 10 Amps

Cream Sandwich is the #14 overall item in impulse outlets, up 19% vs. last year.¹

- Frozen machines are growing faster than any other segment.²
- Away-from-home frozen novelty ice cream sales topped \$2.3 billion in 2000.³



MACHINE SPECIFICATIONS

Capacity: 400 units
Number of Selections: 12
Height: 72"
Width: 35.5"
Depth: 34.4"
Weight: 580 lbs.
Internal Temperature: Minimums -15°F to -20°F
Payment Systems: M&M Coin Mechanism
Bill Acceptor
Power Requirements: 115 Volts, 60 Hz, 10 Amps

Contact Your Representative or Call 888-259-9057 for Program Details.



M&M Refrigerated Candy Machines:

M&M Ice Cream Machines:

MAIN REFRIGERATED CANDY MACHINES.

M&M Peanut
M&M Plain
M&M Crispy
M&M Almond
M&M Peanut Butter
Snickers
Snickers Cruncher
Twix
3 Musketeers
Starburst
Fruit Twists
Starburst Tropical
Starburst Original
Starburst Fruit
Skittles Wild Berry
Skittles Tropical
Skittles
Sour Skittles
Mars Bar
Milky Way
Milky Way Dark
Munch Bar

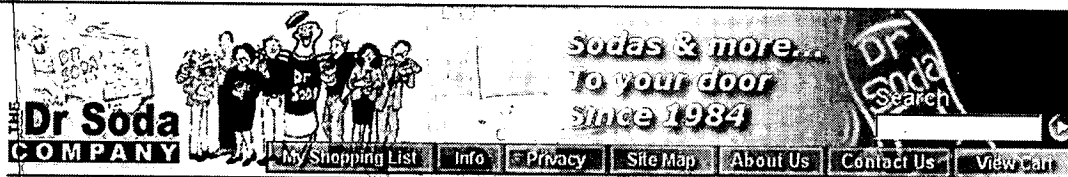
MAIN ICE CREAM MACHINES.

Dove Delight Ice Cream Bar
Dove Bar - Almond/Milk Chocolate
Dove Bar - Chocolate/Dark Chocolate
Dove Bar - Vanilla /Original
Dove Bar - Vanilla/Milk Chocolate
Dove Bar - Caramel Toffee Crunch
Snickers Ice Cream Bar
Snickers Ice Cream Bar "The Big One"
Snickers Ice Cream Cone
Snickers Ice Cream Cone "The Big One"
M&M's Cookie Ice Cream Sandwich
M&M's Ice Cream Cone
M&M's Brownie Ice Cream Sandwich King Size
Milky Way - Vanilla/Milk Chocolate Ice Cream Stick
3 Musketeers Ice Cream Bar

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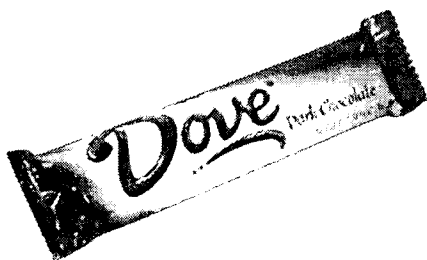
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Dove Bar DARK Chocolate

A DARK Chocolate Dove Candy Bar.

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Almonds
Clementine Tortilla Chips
Eat Smart All Natural Snacks
Shock A Lots Chocolate
Covered Coffee Bean Candy
Garden & Plenty
Quaker Mini Rice Snacks
Jelly Belly Sport Beans
Sweet 'N Low Candy
Bare Fruit
South Beach Diet Bars
ChocoStix From Nabisco
Natura Valley Granola Bars
Blue Diamond Almonds
Reese's Pieces
Hershey Cookies
Hershey Kissables
Nabisco 100 Calorie Packs
Route 11 Chips
Snack Master Jerky
Kara's Trail Mixes & Snacks
Mrs. Field's Cookies
Fun Size, Snack Size, Treat Size
Snacks
Creme Saver Rolls
Hot Tamales + Mike & Ike
Chips
Cookies & Crackers
Fruit Snacks-Nabisco
Snyder's Of Hanover Pretzels
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[Thatch's Popcorn](#)

[Corn On The Cob Popcorn](#)

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Snacks

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DOVE BAR DARK CHOCOLATE

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TGI Friday's
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More Single Serve Snacks
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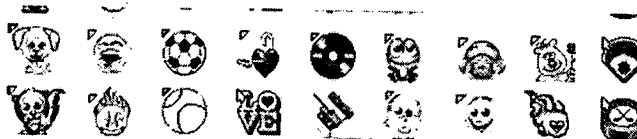
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3 Musketeers enters freezer fracas - Dove International introduces 3 Musketeers ice cream bars

[Prepared Foods](#), April, 1989 by Lynn Dornblaser

3 Musketeers enters freezer fracas

Just when it seemed that the ice cream novelty market had reached its saturation point, a wealth of new frozen novelties arrived--all from major companies.

Dove International (Burr Ridge, Ill.) tops the list in total new product introductions. In 1988, the company introduced 3 Musketeers ice cream bars. The products resemble the candy bar, but they come in vanilla, chocolate, and strawberry flavors. In February, the company introduced 3 Musketeers ice cream snacks. These smaller, bite-size versions of the ice cream bar are being tested in several unnamed markets.

Dove also introduced what is probably the quintessential oxymoron: Dove Bar Light. The 4-oz. bars are made with ice milk and contain one-third fewer calories than regular Dove Bars. They are available in milk chocolate or dark chocolate coating, and are sold in the Midwest.

Nestle Foods (White Plains, N.Y.) also introduced ice cream versions of its candy bars. Candy Tops 3-oz. ice cream bars and nuggets packed 24 per box recreate the taste of Nestle Alpine White, Oh! Henry, Nestle Milk Chocolate with Almonds, and Nestle Crunch bars. The products are in test market in Chicago.

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Omelets, soups, and more

One of the most fascinating products introduced in recent months is Incredible Gourmet. The product, made by an Encino, Calif., company of the same name, consists of microwaveable frozen omelets made with all natural ingredients. The plastic package contains a ring-shaped omelette with a well of "secret sauce" in the center. Varieties include cheese, ham and cheese, Western wild cheese, Spanish, Vegetarian, and seafood. The 6-1/2-oz. omelets retail for \$1.79 in Western states.

Campbell Soup (Camden, N.J.) added a wide range of products to its Hispanic Casera line. These include two types of pastries (Pastellillos de Queso and Pastellillos de Coco), two types of cakes (Bischoko de Natilla), and five frozen entrees. The entrees include Ropa Vieja (shredded beef), Fricase de Pollo (chicken fricassee), Carne Guisada (beef stew), Picadillo (ground beef in sauce), and Pollo Frito (fried chicken) varieties. All are sold in New York City.

Dell Express (Eden Prairie, Minn.), taking the hint from consumers, introduced LitePop microwave popcorn. Each 2.35-oz. package pops up to provide 250 calories of popcorn. True, that isn't necessarily low calorie, but it is lower than the others. What's more, the product uses Morton's LiteSalt to provide a lower sodium content than other brands.

On the wilder side, there's Frito-Lay's Wild 'n Mild Ranch Corn Chips. Frito-Lay (Dallas) sells the line extension nationally.

ConAgra (Ballwin, Mo.) now offers 10 new premium frozen dinners under the Armour Classics banner. Varieties include entree, vegetable, and side dish.

Product and packaging changes

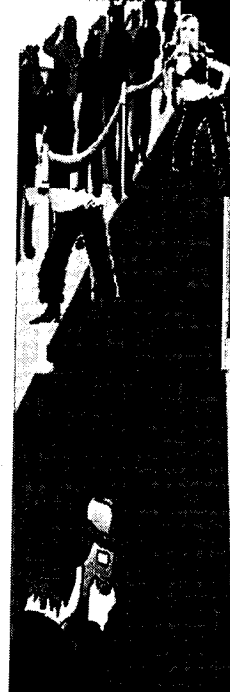
Campbell Soup's Swanson Cheese Ravioli is now flagged "with homestyle tomato sauce." Swanson Tuna Noodle Casserole now reads, "Premium all white chunk tuna;" and Chicken & Noodles says, "made with real cream."

Uncle Ben's (Houston) Country Inn Rice Mixes also have new flags. The Rice

Alfredo variety says, "Now! More Cheese," while the Broccoli Almondine reads, "Now! More Vegetables."

Orange Spray's (Blymouth, Mass.) orangefruit juice and pink orangefruit juice drink are now marketed

**'Shoot' The Popstar
and Get 10 BONUS
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GALE

Ocean Spray's (Plymouth, Mass.) grapefruit juice and pink grapefruit juice drink are now marketed in 10-oz. packs.

Welch Foods (Concord, Mass.) now markets its jams and jellies in reusable jelly glasses featuring dinosaur designs.

J.R. Simplot (Boise, Idaho) began national distribution of its MicroMagic sandwiches in three-packs, which were developed after research showed that consumers purchased an average of 3.2 MicroMagic sandwiches per transaction.

General Biscuit (Elizabeth, N.J.) is marketing its Marie Lu Original Cookies in a Stay Fresh twin-pack box.

Foodservice items of note

Pillsbury (Minneapolis) offers two new frozen entrees: Sweet and Sour Chicken, and Manicotti Florentine. Both products are sold frozen in 5-lb. half-steamtable trays, packed four per case.

Sara Lee (Deerfield, Ill.) expanded its foodservice pie line with Pure Silk pies, available in double chocolate, chocolate peanut butter, pecan praline, and raspberry flavors.

Pepperidge Farm's (Norwalk, Conn.) baked and frozen Outrageous Brownies are made without artificial colors, flavors, or preservatives.

Table : DAIRY PRODUCTS

PHOTO : Dove International just introduced a snack-size version of its 3 Musketeers ice cream bar.

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SNICKERS® Brand Ice Cream Cone.

Discover the satisfaction of SNICKERS® Brand in a rich and delicious ice cream cone. Journey to the center where you'll find a luscious, creamy caramel and peanut core surrounded by premium SNICKERS® Brand ice cream. Topped with even more fresh roasted peanuts nestled in a rich chocolaty coating and wrapped in a fresh baked sugar cone.

[Nutritional Information](#)



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SNICKERS® Brand Ice Cream Bar and SNICKERS® Snack Size Ice Cream Bar.
The great taste of SNICKERS® in ice cream. We take creamy ice cream, top it with chewy caramel and load it with fresh roasted peanuts, then cover it in rich delicious chocolate.

[Nutritional Information](#)

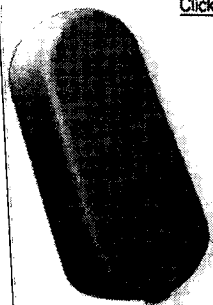


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Milky Way® Brand Ice Cream Bar.
Milky Way® Brand Ice Cream Bars are a delicious combination of smooth, creamy vanilla ice cream and thick chewy caramel, all covered with a rich chocolatey coating.

Nutritional Information



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THE BEST CANDY EXPERIENCE IN ICE CREAM

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STARBURST® Orange & Cherry Sherbet

Swirls of STARBURST Orange & Cherry Sherbet with chewy candy pieces.

Nutritional Facts

Amount per 1/2 cup

Calories	150
Calories from Fat	20
Total Fat	2 (g)
Saturated Fat	1 (g)
Cholesterol	5 (mg)
Sodium	40 (mg)
Total Carbohydrates	33 (g)
Protein	1 (g)
Calcium	%

Gluten-Free Kosher Nut Allergen-Free

INGREDIENTS: skim milk, milk, sugar, corn syrup, high fructose corn syrup, chewy candy pieces (maltodextrin, colored confectionery chips (sugar, partially hydrogenated palm kernel and cottonseed oils, skim milk, mono and diglycerides, Red #40 Lake, soy lecithin, Yellow #5 Lake, Yellow #6 Lake, salt, artificial flavor), white coating (sugar, partially hydrogenated palm kernel and palm oils, reduced mineral whey powder, milk powder, soy lecithin, salt), powdered sugar (sugar, corn starch), water, modified corn starch, partially hydrogenated soybean oil, milk, citric acid, natural and artificial flavor, sugar, soy lecithin, cherry, strawberry, orange, and lemon juices from concentrate), orange juice from concentrate, cream, cherry juice from concentrate, citric acid, cellulose gum, natural flavor, mono and diglycerides, artificial flavor, guar gum, annatto color, Red #40, carrageenan, dextrose, lecithin

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TWIX® Brand Ice Cream Bar.

Now you can get the great taste and cookie crunch of TWIX® Cookie Bars in an ice cream bar. Imagine creamy vanilla ice cream with the chewy caramel and great cookie crunch of TWIX® Brand Cookie Bits all covered in rich delicious chocolatey coating.

Twix

...Coming in 2003



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THE BEST CANDY EXPERIENCE IN ICE CREAM

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Twix Caramel Candy Bar 36ct

Twix original caramel candy bar. There are 36 bars per box.

Rating: ★★★★★ (1 user rating) [\[rate this item\]](#)

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Blair Candy

\$21.00

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Twix Bars 36CT Box

Presenting...the original chocolate caramel cookie bar that we all know and love.

Rating: No user ratings [\[rate this item\]](#)

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CandyWarehouse

\$28.80

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Twix King Size Bars 24CT Box

Amazing Twix candy bars in king size... sweet royalty! Unit Price = \$1.40/bar. Display box contains 24 Twix King Size Bars.

Shipping Weight ~ 6 lbs.

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CandyWarehouse

\$33.60

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M&M Mars Variety Pack 30ct Candy Bars

M&M Mars Variety Pack Candy Bars. There are 30 wrapped full size candy bars per box. Each box contains: 10-Snickers 8-Twix caramel 6-Milky Way 3-Snickers Cruncher 3-3 Musketeers

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Blair Candy

\$18.00

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Chocolate Caramel Cookie Bar

A cookie trenced with caramel covered in chocolate.

Rating: No user ratings [\[rate this item\]](#)

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\$20.51

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Starburst



Starburst... assorted flavor fruit chews in rolls of 12. A box of 36 rolls is \$26.99

Don't need a whole box? Single rolls are available for 79¢ each on the [Pack-a-Bag](#) page. [Click here for Starburst!](#)

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Starburst - box of 36 rolls - \$26.99

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Starburst candy memories... Starburst was one of my favorite candies because they are small and you could sneak eat them in class in school and the teacher would never know as long as you didn't leave the paper in the floor. My dad didn't approve of me eating them cause there were "gonna rot my teeth" according to him but I still have em all and they in good shape too.

I had 3 packs of them one day and I had to do something so I left them on the dinning room table. When I came back there gone. I found out my brother was the one eating them. I got sooo mad, but he bought me more the next day he just said that they were so good he couldn't leave them alone. ~ Barbara from Alabama

As a teenager, my friends and I used to go to the local movie theater most every weekend to see the latest movie. After buying our movie tickets, we would proceed directly to the concession stand to pick out

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tickets, we would proceed directly to the concession stand to pick out some treats to consume during the movie. I would always purchase a roll of Starburst. I loved the chewy texture of the candy and the different fruity flavors that were individually wrapped.

In the darkness of the movie theater, I could not tell which Starburst flavor I was unwrapping (because I could not see the color of the wrapper), and this made eating the candy all the more fun because I would have to guess which fruit flavor I was eating. All Starburst flavors tasted great. ~ Albert from Connecticut

I attended a large high school (3,000) in California in the mid-1960's so I was entering the unknown my first days of tenth grade. The cafeteria was a madhouse but we had a canteen outside that sold snacks, chips, etc. You could get in and out of the line at the canteen in minutes and then go hang out with friends.

My dad always thought I was getting a hot meal but I used my lunch money to buy chips, a package of STARBURST (my favorite), and a coke. I survived high school on chips, STARBURST, and coke! ~ Danna from Tennessee

Starburst memories >>>

Do you have a childhood memory about Starburst candy? Receive a \$10.00 Candy you ate as a kid® gift certificate if we use your story here. To share your story, [click here!](#)

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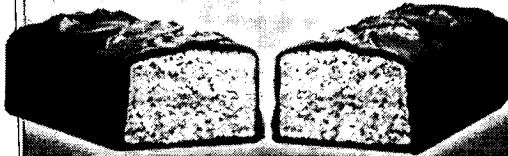
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